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In The

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

v.

MATTEL, INC.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the parties to an arbitration agreement that provides that a court may confirm the award as a judgment can further empower that court to vacate or modify the award on grounds of legal or factual error, despite the Federal Arbitration Act's mandate that a court "must grant an order" confirming an award except on certain specified grounds that do not include legal or factual error.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Mattel, Inc. has no parent corporation and no publicly-held company owns 10% or more of Mattel, Inc.'s stock.

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American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* (2007) 49

Cellular Telecommunications Industry Ass'n, *Wireless Industry Arbitration Rules* (2003) 49

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Ian R. Macneil, *American Arbitration Law—Reformation, Nationalization, Internationalization* (1992) 27, 33

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Note, *Arbitration in the United States*, 2 J. Am. Judicature Soc. 53 (1918-1919) 27, 28

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Wesley A. Sturges, *Arbitration Under the New North Carolina Arbitration Statute—The Uniform Arbitration Act*, 6 N.C. L. Rev. 363 (1927) 46

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INTRODUCTION AND STATEMENT OF THE CASE

This case arises out of a dispute over a lease agreement between petitioner Hall Street Associates, as owner of a tract of property in Oregon, and respondent Mattel, Inc., as a tenant of that property. Petitioner seeks to hold respondent liable for costs to clean up contamination caused by trichloroethylene (TCE), but it is undisputed that the contamination occurred before respondent ever used or leased the land and that respondent's activities did not result in any additional TCE contamination.

The parties ultimately agreed to arbitrate the issue and the arbitrator entered an award for respondent. The arbitrator found, based on two days of testimony and evidence, that the parties did not intend for respondent to become liable for environmental contamination that predated its lease term merely because it had failed to do certain tests of the well water as a tenant of the property (tests that the petitioner, as the property owner, also had failed to do).

Respondent sought confirmation of the arbitrator's award under the Federal Arbitration Act (FAA) in district court, but petitioner applied for vacatur or modification of the award. The district court, without the evidentiary record of the parties' intent before it, vacated the award and ruled that the lease language held respondent liable for the contamination that it did not cause. The court did so based on its view that there were errors of fact and law underlying the award, which are *not* included in the FAA as grounds for vacatur or modification, but were grounds agreed to by the parties consistent with then relevant circuit law. After a remand, the court ultimately entered judgment on an award modified to comply with its view of the law and facts.

The court of appeals twice reversed without reaching the merits and held, under intervening circuit precedent, that the district court lacked authority to vacate an

arbitration award based on an error of law or fact because those grounds exceed the grounds for vacatur set forth by Congress in the FAA. The court of appeals is correct and should be affirmed.

A. Statutory Framework

1. Congress enacted the FAA, 43 Stat. 883, in 1925 (codified in 1947 at 9 U.S.C. §§ 1 *et seq.*) in response to a national movement to make arbitration agreements enforceable. Prior to that time, the common law of many States was hostile to arbitration and provided that if parties agreed in a contract to arbitrate any controversies arising out of that contract, that arbitration provision was severable from the contract and revocable at any time prior to the issuance of an award by an arbitrator.

Some States, most prominently New York, had enacted legislation in the early 1920s to protect arbitration from such judicial hostility, but leading federal courts held that the New York arbitration statute did not govern actions in federal courts. *See, e.g., Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319 (S.D.N.Y. 1921), *aff'd*, 5 F.2d 218 (2d Cir. 1924). Thus, in 1925, Congress created a framework, through the FAA, for enforcement in federal court of arbitration awards.

2. Congress defined the basic statutory terms in Section 1 of the FAA and then, in Section 2, exercised its authority under the Commerce Clause to declare that "a written provision in * * * a contract evidencing a transaction involving commerce" that is an agreement to "settle by arbitration a controversy that thereafter arises out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of" such a contract or transaction, is "valid, irrevocable, and enforceable." The only grounds on which to revoke such an arbitration agreement are grounds that exist for the revocation of contracts generally. 9 U.S.C. § 2.

In Sections 3, 4, and 5, Congress provided the means for enforcement of arbitration agreements. It authorized federal courts, when they otherwise have jurisdiction over a case, to direct the parties to arbitrate cases in the manner agreed-to by the parties, to appoint arbitrators, and to stay pending federal litigation.[1] Section 7 empowers arbitrators to issue subpoenas, backed by the force of the district court.

Sections 9, 10, and 11—which are at the heart of the instant case—provide for judicial enforcement of an arbitration award. Section 9 permits a party to an arbitration agreement to seek, within one-year of the issuance of an arbitration award, an order from a court that confirms the award. Section 9 explicitly states that, if the arbitration agreement provides that a court judgment will be entered on an award made pursuant to the arbitration agreement, "the court *must* grant" an order confirming the award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9 (emphasis added.)

Section 10 authorizes a court to vacate an award, upon application of a party to the arbitration, on four discrete grounds. Section 11 authorizes a court to modify or correct an award, again upon application of a party, on three discrete grounds. Under Section 12, an application for such relief must be filed within three months of the filing or delivery of the award, and Section 13 provides that a court order confirming, modifying, or correcting an award is entered as a judgment of the court, which has the same force and effect as a judgment in a civil action. Section 16 of Title 9 of the United States Code, enacted in 1988, authorizes appeals from, *inter alia*, an order that

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[1] Section 6 addresses the form for seeking such relief (an application, which is to be treated like a motion); Section 8 deals with the availability of certain interim remedies in admiralty cases.

confirms, vacates, modifies, or corrects an arbitration award.

B. Factual Background

1. From 1951 until 1967, Sawyers, Inc. was the owner of the property at issue here and operated a manufacturing facility at the site. Pet. App. 18a (¶ 4). In 1967, GAF Corporation acquired Sawyers and continued the manufacturing activities, which included the use of TCE to degrease metal parts in a building on the property. *Id.* at 18a (¶ 5), 26a (¶ 22). GAF/Sawyers also deposited sanitary wastes in a septic tank and on a drainfield, and dumped drums of degreaser onto the land. *Id.* at 26a (¶ 22). TCE was no longer used at the site after 1981. *Id.* at 26a (¶ 22), 42a.

In 1981, GAF/Sawyers sold a portion of the property to View-Master International Group, Inc. and View-Master Ideal Group (collectively, View-Master). *Id.* at 18a (¶ 7). View-Master owned the property outright until 1983, when it sold the land to Western International Properties, and leased back part of it to continue manufacturing operations at the site. *Id.* at 18a (¶ 9). Western International subdivided the property in 1984, selling the unencumbered portion to a commercial real estate development company and conveying the portion that View-Master was leasing to an individual. *Id.* at 18a (¶ 10), 41a. That individual transferred his ownership interest to Cascade Square Associates (Cascade) in 1985. *Ibid.*

View-Master continued as a tenant on the land and became a subsidiary of Tyco in 1989, when Tyco purchased its assets. *Id.* at 18a (¶ 11). Then, in 1997, respondent Mattel, Inc. acquired Tyco and assumed its rights and obligations as a tenant of the property. *Id.* at 18a (¶ 12).

The following year, Cascade Square Associates formed petitioner Hall Street Associates and transferred to it

ownership of the property, which included the privileges and duties of serving as landlord. *Id.* at 18a (¶ 13).

2. Cascade, as owner of the property and the property's well-water system from 1985 until 1998, did not test the well water for TCE as Oregon law requires. Br. in Opp. 3-4; Or. Rev. Stat. §§ 448.115 *et seq.* and implementing regulations. The tenants occupying the property, *i.e.*, View-Master, Tyco, and respondent, also did not test the well water for TCE. Pet. App. 26a (¶ 24).

In March 1998, petitioner had an environmental consultant evaluate the well water on its land, and the consultant discovered that the well water contained levels of TCE in excess of the federal maximum. *Id.* at 27a (¶ 25). Subsequent investigations followed, and the Oregon Department of Environmental Quality (DEQ) determined that other types of contaminants were also present on the property, and that the contamination extended beyond the well water, to the shallow soil, groundwater, and deep aquifer underlying the property. *Ibid.*

Respondent shut down the well immediately (less than one year after its tenancy began). *Id.* at 27a (¶ 26). A few months later, in November 1998, respondent and GAF/Sawyers entered into a consent order with DEQ. Under the agreement, GAF/Sawyers agreed to undertake environmental investigation of the property and respondent agreed to conduct public and employee outreach in regard to the environmental conditions. *Id.* at 43a.

3. In early 2000, respondent Mattel notified petitioner Hall Street that it intended to terminate the lease agreement. Pet. App. 18a (¶ 14). Respondent then spent more than $1 million on repairs and inspections, *id.* at 29a (¶ 40), and surrendered the property to petitioner in May 2001 in good condition and working order, consistent with the lease. *Ibid.*

Meanwhile, however, in March 2000, petitioner filed suit in Oregon state court for a declaratory judgment that respondent's termination of the lease was not permissible

and that, in any event, the lease obligated respondent to indemnify petitioner for costs related to environmental clean up and third-party lawsuits. *Id.* at 45a. Petitioner sold the property in 2004 with no showing of change to its value. Dt. Ct. Dkt. No. 164, Exh. B (July 25, 2005).

a. The lease in effect between petitioner and respondent had been entered into by petitioner's principal, Cascade Square Associates, and respondent's predecessor, then-tenant View-Master. Pet. App. 19a (¶ 16). The lease required, *inter alia*, that the tenant assume liability "for the use or presence in the Building materials or on or about the Premises of any hazardous waste" and responsibility for investigation and cleanup of "any such release or presence or use." J.A. 86 (§ 12(b)). The lease provided that the tenant would "indemnify and defend Landlord" for "all losses, costs, damages, expenses (including environmental abatement costs[)] or liabilities directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials." J.A. 86 (*quoting* § 12(b)); *see also* Dt. Ct. Dkt. No. 101, at 3 n.4 (Feb. 4, 2003) (the indemnity specified in Section 12 covers "hazardous Building materials").

The lease included an *exception* to the tenant's obligation to indemnify the landlord under Section 12 as follows:

> *To the extent Tenant has been in compliance with applicable environmental laws* then, notwithstanding the foregoing language in Section 12.b. above, Tenant shall *not* be held liable following the expiration of this Lease term for the following:
>
> * * *
>
> (iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant * * *.

J.A. 87 (§ 12(c)) (emphasis added).

The lease also included an indemnification clause that stated, in relevant part, that the tenant would "defend and indemnify" the landlord for "all liability, damages, costs, or expenses" that arose "from any act, omission, or negligence" of the tenant or its "officers, contractors, licensees, agents, servants, employees, guests, invitees, predecessors-in-interest, or visitors in or about the Building or Premises." J.A. 88 (§ 13(a)). That Section applied to an act, omission or negligence "whether occurring in the construction of or choice of building materials for the building, occurring during or prior to the original Lease, during this Lease, relating to discharging hazardous materials, or arising from any breach or default under this Lease by Tenant." *Ibid.*

The section also had an exception to the indemnification clause that stated, *inter alia*, that, "[t]o the extent Tenant has been in compliance with applicable environmental laws then" the tenant "shall not be held liable following the expiration of this Lease term" for various specific costs related to hazardous waste removal and disposal, and "[a]ny other liability, damage, cost, or expense which has not been caused directly or indirectly by the acts of Tenant." J.A. 89 (§ 13(a)), 90 (§ 13(a)(iv)).

Various other provisions of the lease reflected the parties' intent that respondent not be responsible for damages caused by others. For example, Section 13 specified that there would be no indemnity to the extent the damages were caused by the intentional or negligent acts of the landlord. J.A. 91 (§ 13). Section 13 further specified that, in the event of litigation against the landlord over failure to comply with environmental laws over a period of time, other tenants would pay their "prorated amounts" of the landlord's defense costs. It stated that respondent's obligation to defend would be "limited to its allocable portion of such defense costs." J.A. 88-89 (§ 13). The lease also stated that the parties would attempt to negotiate allocation of defense costs based on respondent's "actual contribution to the damages which

are the subject of such suit." J.A. 89 (§ 13). Also, the lease provided that when respondent ceased to be the tenant, it was required to surrender the premises to petitioner "in as good condition as when received by View-Master" from petitioner under the original lease "or as thereafter improved, reasonable use, wear and tear excepted," without any responsibility for conditions that preexisted that lease. J.A. 100 (§ 20).

4. Respondent removed petitioner's lawsuit to the United States District Court for the District of Oregon based on diversity of citizenship, J.A. 1, and the case proceeded to a bench trial on the question whether respondent was entitled to terminate the lease. Pet. App. 18a-19a. The court ruled in respondent's favor on that question and ordered the parties to mediation, but mediation failed. J.A. 45; Br. in Opp. 4.

C. Proceedings Below

1. The original arbitration award in respondent's favor

In October 2001, petitioner and respondent entered into an agreement to arbitrate the remaining issues in the case, in the form of a stipulation and incorporated rules for the arbitration. Pet. App. 4a-16a; *see* 9 U.S.C. § 2 (FAA extends to agreement to arbitrate an existing controversy). The agreement provided that the parties would submit the arbitrator's decision to the district court "for the confirmation of the decision as a judgment of such court." Pet. App. 15a (¶ 24). The agreement further stated that the district court "may enter judgment upon any award, either by confirming the award or by vacating, modifying, or correcting the award." *Id.* at 16a (¶ 27). The agreement purported to require, consistent with then-governing circuit precedent, that "[t]he Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii)

where the arbitrator's conclusions of law are erroneous." *Ibid.*[2]

The arbitration commenced on December 12, 2001, and continued for two days. J.A. 48. The arbitrator accepted testimony, heard argument, received documentary evidence, reviewed briefing, and visited the site. Br. in Opp. 4.

On January 2, 2002, the arbitrator rendered a decision in favor of respondent. Pet. App. 17a-38a. Parsing through awkwardly phrased provisions of the lease, the arbitrator correctly found, *inter alia*, that the lease unambiguously did not impose a duty on respondent to indemnify petitioner for costs related to GAF/Sawyer's use of TCE that contaminated the well water. The arbitrator noted that respondent, View-Master, and Tyco had not used TCE on the property and had not engaged in any activities that had resulted in additional TCE contamination. *Id.* at 35a (¶ 5). The arbitrator ruled that their failure to test for TCE contamination did not

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[2] The parties' provision regarding grounds for vacatur, modification, and correction was listed as one of more than two dozen provisions in the agreement and, contrary to petitioner's claim (Pet. Br. 4-5, 39), the affidavit submitted by petitioner to the district court, J.A. 52 (¶ 4), does *not* aver that the "parties would have bypassed arbitration if judicial review for legal error had been unavailable under Ninth Circuit precedent at the time." Indeed, the court of appeals determined, as part of its severability ruling, that the evidence did *not* establish "that the parties intended that the entire arbitration agreement should fail in the event that the expanded standard of review provision failed." Pet. App. 115a. Petitioner attempted to rely on that same affidavit in its brief on appeal and its petition for rehearing challenging the panel's severability ruling. *See* Pet. C.A. (No. 03-35525) Br. 28-29; Pet. C.A. (No. 03-35525) Pet. for Reh'g 4, 11. That petition was denied, *see* J.A. 17, and petitioner did not raise the fact-bound severability holding in its petition for *certiorari*.

constitute a violation of "applicable environmental laws" within the meaning of the lease. *Id.* at 35a (¶ 5).[3]

2. The district court's remand based on its view that the arbitrator made a legal error and engaged in inadequate factfinding

Respondent sought confirmation of the arbitration award in district court on January 29, 2002. J.A. 51 (¶ 1). Petitioner responded with a motion to vacate, modify, or correct the award on February 13, 2002, contending, *inter alia*, that the arbitrator erred in concluding that respondent had remained in compliance with "applicable environmental laws" as required by the lease. Pet. App. 47a.

Respondent opposed petitioner's motion on the merits on the ground that the arbitrator was correct as to the parties' intent regarding the phrase "applicable environmental laws," which meant environmental laws with which the tenant was obliged to comply in order to protect petitioner's property from damage caused by the tenant's release of hazardous waste, use of hazardous building materials, or other such activities. Dt. Ct. Dkt. No. 73, at 21-22 (Feb. 25, 2002). Respondent also argued that there was no evidence that respondent's purported failure to comply with applicable environmental laws had caused any harm to petitioner or third parties, and there was no evidence that the value of the property was diminished during the course of the lease. *Id.* at 24-25.

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[3] The arbitrator concluded that respondent was the "prevailing party" and was entitled to attorneys' fees, costs and expenses pursuant to the lease. *Id.* at 38a, 45a. In a separate ruling on January 29, 2002, the arbitrator awarded respondent fees and costs in the amount of $441,545.58. *Id.* at 45a, 47a; Dt. Ct. Dkt. No. 68, at 2 (Jan. 29, 2002).

The district court vacated the arbitrator's decision and award on April 29, 2002. Pet. App. 39a-58a. The court did not approach the arbitrator's decision as a typical case under the FAA. *Id.* at 46a. Rather, the court invoked the grounds for vacatur created by the parties' arbitration agreement, and reviewed the award for legal error and for substantial evidence supporting the facts. *Ibid.* (citing *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997)).

The district court found legal error in the arbitrator's determination that respondent was in compliance with "applicable environmental laws," and therefore not liable to petitioner for environmental clean up costs. *Id.* at 51a-56a. Petitioner had not, however, provided the district court with the arbitration record. *See* Dt. Ct. Dkt. No. 138, at 119-121 (Aug. 20, 2002). Therefore, the district court did not have before it the evidence relevant to whether the lease terms were ambiguous or the intent of the parties to the contract, despite the relevance of such evidence under state law. *See* note 13, *infra*. The court nonetheless rejected the arbitrator's finding and ruled that "the arbitrator erred as a matter of law" and that the parties must have meant any environmental law whatsoever that applied to a tenant of the property, regardless of whether the law was supposed to protect against a tenant's conduct that might cause property damage. Pet. App. 53a-56a. The court remanded the case to the arbitrator for further consideration in light of its ruling. *Id.* at 56a. The court also remanded for the district court to "fully develop the factual record" on another issue. *Id.* at 57a.

3. The revised arbitration award in petitioner's favor to conform to the district court's legal and factual rulings

The arbitrator reversed its liability determination based on the legal ruling in the remand order from the district court, and held respondent legally liable. *Id.* at

81a. Because petitioner had not demonstrated that current or future remediation was necessary, however, and had not established any future damages, the arbitrator awarded only "nominal damages," *id.* at 82a, and the vast bulk of the $583,971.60 award was composed of attorneys' fees and costs. *Id.* at 84a-85a. The arbitrator also awarded a declaratory judgment for future costs.

4. The district court's modification and confirmation of the revised arbitration award

The district court confirmed the revised award in part and modified it in part. *Id.* at 86a-110a. The court again applied the "standard of review" that "the parties drafted" in their agreement. *Id.* at 89a. In relevant part, the district court confirmed the arbitrator's award that now found that the indemnification exception for compliance with "applicable environmental laws" did not apply in light of the district court's earlier legal construction of that term. The court ruled that respondent's contrary arguments regarding various limitations in the lease language were "foreclose[d]" by the court's own earlier remand order and found that the arbitrator's conclusion was now in accord with that order. *Id.* at 105a-106a. The court modified aspects of the award regarding the interest on the award. *Id.* at 95a-96a.[4]

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[4] The district court ordered respondent to pay petitioner $484,031.12 in past costs and damages, $252,065.32 in attorneys' fees, and $74,011.05 in costs and expenses (plus certain pre- and post-judgment interest). *Id.* at 110a. The district court entered a declaratory judgment against respondent for all future costs petitioner may be required to pay to DEQ, or to expend as a result of a DEQ order relating to the environmental clean up of the property. *Id.* at 113a.

5. The court of appeals' reversal and remand for confirmation of the initial arbitration award under the FAA unless prevented by statutory grounds

The court of appeals affirmed in part, reversed in part, and remanded the case. Pet. App. 114a-116a. The court held that the provision in the arbitration agreement purporting to "control[] the mode of judicial review" was unenforceable under its intervening *en banc* precedent of *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003) ("Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision" under the Federal Arbitration Act and "private parties may not contractually impose their own standard on the courts"), *cert. pet. dismissed*, 540 U.S. 1098 (2004). Pet. App. 115a-116a & n.3. The court also ruled that the provision was severable from the remainder of the arbitration agreement. *Ibid.* The court therefore reversed and directed the district court on remand to confirm the original award "unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." *Id.* at 115a-116a. Also, the court affirmed the district court's decision after the bench trial that respondent had not breached the lease through its termination of its tenancy. *Id.* at 116a. Petitioner's petition for rehearing *en banc* seeking review of, *inter alia*, the severability determination was denied. J.A. 17.

6. The district court's second vacatur of the original arbitration award and second entry of a modified arbitration award in petitioner's favor

On remand, the district court still did not confirm the award. Instead, it ruled that an arbitrator's award can be vacated under the FAA if it is based on an "implausible interpretation" of a contract. Pet. App. 124a. The court then held that the arbitrator's interpretation of "applicable environmental laws" was "implausible." *Ibid.* The district court again vacated the original arbitration award and again entered judgment in accordance with its earlier opinion that had been reversed by the court of appeals. Pet. App. 127a-128a.

7. The court of appeals' second reversal of the district court

The court of appeals again reversed the district court's judgment. Pet. App. 131a-134a. The court held that "[i]mplausibility is not a valid ground for avoiding an arbitration award under either 9 U.S.C. §§ 10 or 11." *Id.* at 132a. The court ruled that the arbitrator's decision in this case was not "'completely irrational'" and did not support vacatur under Section 10(a)(4), "the only subsection of either 9 U.S.C. §§ 10 or 11 that could conceivably apply to the arbitration award in this case." *Id.* at 133a (*quoting Kyocera*, 341 F.3d at 997).

The court directed the district court "to enforce the original arbitration award and declare [respondent] Mattel the prevailing party." *Id.* at 133a. One member of the panel dissented, agreeing with the majority's identification of the governing legal standard, but viewing the arbitrator's interpretation as "completely irrational." *Id.* at 133a-134a.

A petition for rehearing *en banc* by petitioner was denied on October 17, 2006. *Id.* at 137a-138a.[5] This Court granted the petition for a writ of *certiorari* on May 29, 2007.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the grounds set forth in Sections 10 and 11 of the FAA are the exclusive grounds on which a court may deny an application to confirm an arbitration award and vacate, modify, or correct the award.

A. Section 9 of the FAA unequivocally directs that a court "*must* grant" an application for an order confirming an arbitration award, unless "the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9 (emphasis added). It is undisputed that Sections 10 and 11 establish only certain specified grounds and do not authorize a court to vacate, modify, or correct an award based merely on an error of law or fact. That is consistent with the limited role of the court under the FAA, which is to enter an arbitration award as an enforceable judgment of the court, not to review the merits of the award.

Section 9 is not a default standard as petitioner would have it, subject to the parties' alteration. The text of Section 9 makes clear that it is a mandate for confirmation of the award subject only to Sections 10 and 11. Elsewhere in the statute, Congress established default rules on other

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[5] The court of appeals' mandate issued on December 21, 2006, and the district court entered judgment for respondent on February 26, 2007. Petitioner filed an appeal of that judgment, but informed the court of appeals that it will dismiss that appeal if this Court affirms the court of appeals' judgment in this case. Pet. C.A. (No. 07-35257) Reply to Resp. Opp. to Mot. to Stay Appellate Proceedings, at 2-3 (July 3, 2007). The court of appeals stayed briefing in that appeal pending the outcome of this proceeding. C.A. (No. 07-35257) Order (Aug. 21, 2007).

issues that allow the parties to an arbitration agreement to adopt a provision different from the default rule. Congress did not do so with respect to the grounds for judicial denial of an application for confirmation of an award.

Petitioner is wrong that this Court "implicitly recognized" judicially created exceptions to the confirmation of awards in *Wilko v. Swan*, 346 U.S. 427 (1953). Rather, the Court's reference in that case, in *dicta*, to "manifest disregard" goes to the scope of the statutory grounds in Section 10, and did not establish a nonstatutory ground for vacatur, as petitioner urges in this case.

Section 2 of the statute also demonstrates that Sections 9, 10 and 11 are not mere default rules. Section 2 makes the FAA applicable to agreements to "settle" a controversy "by arbitration." But if the parties to an arbitration agreement can agree that a court will refuse to confirm an award if the award contains an error of law or lacks substantial evidence supporting facts, then arbitration becomes only a prelude to judicial review and there is no agreement that the arbitration will "settle" the controversy.

The FAA's limited grounds for vacatur, modification, or correction of an award reflect a deliberate choice made by Congress in 1925 to reject an alternative approach of certain contemporaneous arbitration laws in some States, in particular Illinois, that permitted vacatur of arbitration awards for legal error. Congress followed, instead, the New York Arbitration Act of 1920, which had been uniformly interpreted not to permit review of an arbitrator's conclusions of law or findings of fact.

Because petitioner has neither text, structure, nor history on its side, it repeatedly attempts to find support in two cases of this Court, *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), but neither

provides the governing framework for this case. *Volt* relied on principles of federal preemption and looked to the text of Section 4, neither of which are relevant here. *First Options* applied the general rule that parties can agree to have any controversy, including a controversy about the scope of arbitration, settled by an arbitrator, which is also not at issue here.

B. Petitioner, to the extent it addresses the text of the statute at all, focuses on the provision that makes judicial confirmation of an award under Section 9 available only where the parties agreed to have a judgment of the court entered on the award. But that provision is to distinguish an arbitration award that can be enforced through the expedited procedures of the FAA, from an award that is enforceable only through a more laborious common law contract action because there was not an agreement for entry of a court judgment on the award.

Petitioner's view is that parties to an arbitration agreement can redefine the federal cause of action under Section 9 for confirmation of an arbitration award to include whatever supplemental elements they like. That is contrary to well-settled law that courts are not bound by the parties' stipulations as to what federal law is. Furthermore, it is well established that, in a standard civil action, a court is not bound by the parties' agreements about how a court will exercise its equity power. Yet under petitioner's view, a court would be bound by the grounds drafted by the parties for confirmation, vacatur, modification, or correction, rather than by the grounds stated by Congress.

Petitioner attempts to limit its argument to judicial review that is consistent with a "normal judicial function," but that only highlights the lack of any meaningful stopping point in its argument. There are a multitude of standards that parties could agree to have a court apply to their arbitration award, including *de novo* review, which certainly would render arbitration a mere dress rehearsal

for full-scale court litigation in contravention of the purpose of the FAA. Moreover, parties also could presumably set whatever standard they chose for *appellate* review of the district court's decision, even in this Court. The logic of petitioner's proposal would also allow parties to *override* the statutory vacatur grounds and agree to require confirmation of an award by a court notwithstanding the existence of grounds set forth in Sections 10 or 11.

Petitioner's analogy to judicial review of a ruling by a magistrate judge, special master, or bankruptcy judge reveals the constitutional doubts raised by petitioner's argument. The fact that Article III judges have authority over magistrate judges was critical to this Court's holding that Congress can delegate certain functions to magistrate judges. Federal judges have similar authority over special masters and bankruptcy judges, but not so for arbitrators.

C. Selection by parties of nonstatutory grounds for judicial vacatur, modification, and correction of arbitration awards based on errors of law or fact is contrary to the core purposes of the FAA and would create havoc for arbitrators and courts alike. It would almost certainly mean that arbitrations would become like court proceedings, with adoption of explicit limits on the scope of the record, rulings on evidentiary objections, and formal findings. That would seriously undermine the time and cost savings that arbitration is supposed to yield. Or, if arbitration proceedings remained informal and less structured, courts would be thrown into the disconcerting role of conducting review for factual error where rules of evidence do not govern, for legal error where legal rulings are based on such records, and reviewing awards with no requirement for a detailed written rationale. In either event, inevitable questions will arise including, for example, what to do about harmless error on judicial review and collateral disputes regarding whether an issue constitutes a question of law, of fact, or a mixed question.

Parties can protect themselves against the risk of an anomalous decision by an arbitrator through appellate

arbitration, which is widely available through the leading arbitration associations. Appellate arbitration services allow parties to provide for a second review by arbitrators of an award under whatever standards the parties wish. What parties cannot do is require a court to apply standards of review and grounds for judicial vacatur, modification, or correction of an arbitration award that the parties customize for their particular cause of action in court, but which Congress, in the FAA, did not authorize.

ARGUMENT

THE FEDERAL ARBITRATION ACT REQUIRES THAT A COURT CONFIRM AN ARBITRATION AWARD UNLESS THE AWARD IS VACATED, MODIFIED, OR CORRECTED ON ONE OF THE SPECIFIED STATUTORY GROUNDS, AND PRIVATE PARTIES CANNOT AGREE TO NONSTATUTORY GROUNDS THAT BIND THE COURT

Section 9 of the FAA unequivocally establishes that a court must grant an application to confirm an arbitration award unless the award is vacated, modified, or corrected on grounds delineated in Sections 10 and 11 of the statute. Petitioner would replace this framework that Congress carefully crafted with a confusing pastiche of standards of review that are limited only by the imagination of the parties.

A. The Text, Structure, And History Of The FAA Demonstrate That Sections 10 And 11 Provide The Exclusive Grounds Upon Which A Court Can Deny An Application To Confirm An Arbitration Award Under Section 9

The text and overall structure of the FAA demonstrate that Congress did not authorize parties to agree to nonstatutory grounds, including review for legal or factual error, for a court's denial of an application to confirm an arbitration award.

1. The only grounds allowed under Section 9 for denial of an application to confirm an award are those listed in Sections 10 and 11, which do not include mere error of fact or law

a. Section 9 imposes a duty on a court to grant an application to confirm an arbitration award if the parties agreed in the arbitration agreement to have a court enter judgment on an award. Congress stated that "the court *must* grant" the application except in one situation, *i.e.*, where "the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9 (emphasis added).

The only grounds in Sections 10 and 11 on which a court is authorized to vacate, modify or correct an award are as follows. Judicial vacatur of an arbitration award under Section 10 is authorized:

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, * * * or in refusing to hear evidence, * * * or any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4).

Judicial modification or correction of an arbitration award under Section 11 of the FAA is also authorized only on limited grounds:

> (a) Where there was an evident material miscalculation of figures or an evident material

> mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11(a)-(c).

It is difficult to imagine how Congress could have been any clearer. The detailed circumstances listed in Sections 10 and 11 identify the instances in which a court is authorized to deny an application to confirm an arbitration award under Section 9. In all other circumstances, the court "must" grant an order of confirmation. That is consistent with the limited role of the court under the FAA, which is to enter an arbitration award as an enforceable judgment of the court, not to review the merits of the award. It is undisputed that Congress did not include an arbitrator's error of law or lack of substantial evidence to support facts as grounds on which a court can deny an application to confirm under Section 9 or can vacate, modify, or correct an arbitration award under Sections 10 or 11.

b. Despite this patently clear statute, petitioner contends that Congress meant for the grounds listed in the statute for denial of an application to confirm an award to be only "default" rules that the parties to an arbitration agreement can alter. But Section 9 is not a default standard subject to such alteration.

First, the language in Section 9 that specifies that any denial of confirmation must be "as prescribed in sections 10 and 11 of this title," would have no meaning if Congress had intended to create only a default rule and to permit parties to select other grounds, not identified in Sections 10 and 11, for denial of confirmation of an award. And petitioner's interpretation gives that language no

meaning, contrary to the ordinary rule of statutory construction that every word in a statute must be construed to have meaning. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "). The only possible meaning of the phrase "as prescribed in sections 10 and 11" is to establish that the grounds for vacatur, modification, or correction of an award in Sections 10 and 11 are the exclusive grounds on which a court may rely to deny an application to confirm an award.

Second, in Section 5 and in another provision of Section 9, Congress expressly established default rules on other issues that allow the parties to an arbitration agreement to adopt a provision different from the default rule. *See* 9 U.S.C. § 5 (default rule that court should designate and appoint single arbitrator, but parties may provide for a different method of appointment and for more than one arbitrator); *id.* at § 9 (default rule that application to confirm award is to be made in federal court where award was made, but parties may specify another court). By contrast, in Section 9's provision for denial of an application to confirm an award, Congress designated only the grounds prescribed in Sections 10 and 11 without any allowance for that to be trumped by the parties' choice of different grounds. Thus, Congress knew how to create a default rule in the FAA and did so in more than one instance, but did *not* do so with regard to the grounds for denial of an application to confirm an award. *See Andrews*, 534 U.S. at 28 (relying on general maxim "*expressio unius est exclusio alterius*" to determine that "Congress implicitly excluded a general discovery rule by explicitly including a more limited one"); *United States v. Brockamp*, 519 U.S. 347, 352 (1997) ("explicit listing of exceptions" to running of limitations period demonstrates Congress's intent to preclude "courts [from] read[ing] other unmentioned, open-ended, 'equitable' exceptions into the

statute"); *The Raleigh & Gaston R.R. Co. v. Reid*, 13 Wall. 269, 270 (1871) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

c. Petitioner is wrong that this Court has "implicitly recognized" (Pet. Br. 24) that the grounds listed by Congress in Sections 10 and 11 are not exclusive grounds for vacatur, modification, or correction of an award. The only case under the FAA cited by petitioner is *Wilko v. Swan*, 346 U.S. 427 (1953), which contained a negatively phrased clause that has been read by some to mean that an arbitration award can be vacated if the arbitrator acted in "manifest disregard" of the law. *See* 346 U.S. at 436-437 ("[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."). That statement, however, was not necessary to the case's holding in *Wilko*, which in any event was itself overruled in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Moreover, to the extent *Wilko* could be read to suggest that "manifest disregard" is a ground for vacatur of an arbitration award under the FAA, Justice Douglas's opinion for the Court also suggested that it was a ground for vacatur encompassed within Section 10 itself. Just two sentences before its mention of "manifest disregard," the opinion stated that the "[p]ower to vacate an award is limited," and quoted the entire text of Section 10. *See* 346 U.S. at 436 & n.22; *cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656-657 (1985) (Stevens, J., dissenting) (summarizing collectively the grounds for vacatur under section 10 as "manifest disregard"). This is the conclusion of the better reasoned court of appeals' decisions. *See, e.g., Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960); *I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 431 (2d Cir. 1973); *Kyocera Corp. v. Prudential-Bache*

Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003) (en banc), *cert. pet. dismissed*, 540 U.S. 1098 (2004).

Petitioner expressly acknowledges that the review it seeks for legal error "differs from the vacatur standards set forth in sections [sic] 10" of the FAA. Pet. Br. 28. Thus, petitioner's argument is not governed by the *Wilko* Court's view of the scope of Section 10 in any event. Indeed, in *Wilko*, itself, the Court held that the FAA "contains no provision for judicial determination of legal issues" resolved by the arbitrator, 346 U.S. at 437, which is what petitioner now urges. *See also id.* at 439 (Jackson, J., concurring) (noting that the majority had "decide[d] that the Arbitration Act precludes any judicial remedy for the arbitrators' error of interpretation of a relevant statute"). The Court expressly contrasted the FAA system to the British system, which allowed for judicial review of legal questions under the then-governing English Arbitration Act of 1889, 52 & 53 Vict., c. 49. *See* 346 U.S. at 437 & n.25.

Petitioner's reliance on *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), to claim that this Court has recognized a public policy exception to Section 9 of the FAA is also misplaced because that case did not involve the FAA. It dealt with the enforcement of arbitration awards made pursuant to collective bargaining agreements. As explained by the Court in the *Steelworkers' Trilogy*, that body of arbitration case law is rooted in federal common law and not an arbitration-specific statute. *See United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). It thus does not bear on the correct interpretation of the FAA.[6]

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[6] Petitioner's citation (Pet. Br. 35 n.7) to *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), is unavailing because the statute in

(Continued on following page)

Furthermore, even in the collective bargaining context, this Court has recognized that a court may refuse to enforce an arbitration award based on "public policy" only when the award itself conflicts with the "explicit," "well defined," and "dominant" policies of a different federal statute, and not the "general considerations of supposed public interests." *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62-63 (2000) (internal quotation marks omitted). Petitioner argues as if its interests are equivalent to the legislative acts of a sovereign that this Court must reconcile with the text of the statute. It is mistaken. This Court's cases bring into harmony various acts of Congress; they do not license a court's disregard of the requirements of one statute at the desire of the parties to an arbitration agreement.

2. Section 2 makes the FAA applicable to agreements to "settle" a controversy "by arbitration," which is negated by petitioner's interpretation

Section 2 of the FAA, which is the lynchpin of the statute, also demonstrates that Sections 9, 10 and 11 are not mere default rules that allow parties to agree to wholesale reconsideration by courts.

Section 2 makes the FAA applicable to agreements to "settle" a controversy "by arbitration." 9 U.S.C. § 2. Under Section 2, in order to constitute an "arbitration," the parties must give a third party the authority to "issue a binding award based on [its] determination." 1 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 2.3.2, at 2:23 (1994).

Indeed, the authority to settle a controversy through a final determination of the controversy is what

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that case, ERISA, did not identify the standard of judicial review for decisions by benefit plans and, instead, left it to the Court to create a federal common law standard.

distinguished arbitration under the New York Arbitration Act of 1920 (the model for the FAA, as we discuss below) from other forms of third-party referrals. *See Petition of American Ins. Co.*, 203 N.Y.S. 206, 207 (N.Y. App. Div. 1924) (contrasting an arbitration, which is "the submission of all the matters that are in controversy between the parties for final determination upon the whole issue," and a decision "which is not conclusive as to the ultimate rights of the parties"); *In re Fletcher*, 143 N.E. 248, 251 (N.Y. 1924) (proceeding is not an arbitration when the "so-called award" would not "settle the ultimate rights of the parties"); S. David Stutson, Note, *Contracts: Agreements for Appraisals and Arbitrations: New York Arbitration Law*, 8 Cornell L. Q. 53, 54 (1922).

But arbitrators are denied the authority to settle a controversy if the parties agree that a court must review the law and facts on which the award is based and cannot grant an application to confirm the award if it finds any error. In such circumstances, the arbitration "settles" nothing and fails to constitute a final determination. Instead, the arbitration becomes a mere dress rehearsal for litigation.

Arbitration settles a controversy only if the framework crafted by Congress is given full effect and a court is required to grant an application to confirm an arbitration award except on the limited grounds prescribed in Sections 10 and 11. In such circumstances, the court's role is properly limited to reduction of the award to a judgment. Indeed, one of the grounds in Section 10 for vacatur of an arbitration award is if the arbitrators did not make a "final, and definite award upon the subject matter submitted." 9 U.S.C. § 10(a)(4).

3. The FAA reflects a deliberate choice by Congress to reject the alternative approach of some of the contemporaneous arbitration laws that permitted vacatur of arbitration awards for legal error

By the time Congress enacted the FAA, Illinois and at least five other States had enacted arbitration laws that expressly permitted a court to review an arbitration award for legal error. Congress deliberately rejected that approach in the FAA. The FAA was based, instead, on the New York Arbitration Act of 1920, which did not allow such review and was understood at the time to be the antithesis of the Illinois arbitration law.

a. Starting at around the time of World War I, legal reformers urged state and federal governments to modernize their arbitration statutes. *See generally* Ian R. Macneil, *American Arbitration Law—Reformation, Nationalization, Internationalization* (1992). A split developed in the movement, however, over several substantive points. The primary dispute was whether parties would be bound to an agreement to arbitrate that was made prior to the existence of a controversy between the parties. That question was the primary focus of the modernizers' national debates. *See id.* at 29-47.

But another issue that divided the modernization movement was the grounds on which a court could rely to confirm or vacate an arbitration award. Illinois and New York took opposite positions on this issue and became two poles around which the debate formed. The two States were considered leaders in the area because they contained the country's major commercial centers, and they both enacted arbitration statutes during this period before Congress's enactment of the FAA.

b. The judicial review petitioner seeks in the instant case is akin to the judicial review of legal issues permitted under the Illinois statute. *See* Laws of Ill. 1917, ch. 202, *reprinted in* Note, *Arbitration in the United States*, 2 J.

Am. Judicature Soc. 53, 55-57 (1918-1919). The Illinois Arbitration Act of 1917 contained express mechanisms by which the parties could obtain *de novo* judicial review of legal rulings in arbitration awards. These provisions, akin to those then in effect in England, were intended, according to the statute's supporters, to rely on the "superior" factfinding of arbitrators, while questions of law were "expertly disposed of" by the courts. *Id.* at 55. Section 6 of the Illinois Arbitration Act authorized the arbitrators—at their discretion or at the "request of a party"—to "state their final award * * * in the form of a conclusion of fact for the opinion of the court on the questions of law" or "at any stage of the proceedings [to] submit any question of law arising" from the controversy "for the opinion of the court stating the facts upon which the question arises." *Id.* at 55-56 (reprinting § 6(a) & (b)). In turn, the statute authorized the court to set aside the award if "any legal defects shall appear in the award of such proceedings, or if it shall appear that the award is not sustainable under the opinions of the court upon questions of law under section 6 of this act." *Id.* at 56 (reprinting § 11).

By the time Congress enacted the FAA in 1925, at least three other States (Massachusetts, Nevada and Utah) had adopted provisions similar to the Illinois Act. *See* Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* 505-506 (1930). In addition, at least another two States (Nebraska and Washington) had express provisions in their statutes that authorized courts to set aside an arbitration award if the award was based on an error of law or fact. *See id.* at 506, 857.

By contrast, the New York Arbitration Act of 1920, which contained language virtually identical to what is now Sections 9, 10, and 11 of the FAA, did not permit a court to set aside an award based on an arbitrator's legal

error.[7] Julius Cohen—who was the principal drafter and leading proponent of both the New York Act and the FAA, *see Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Senate and House Subcomms. of the Comms. on the Judiciary*, 68th Cong. 10, 19 (1924)—explained that New York had rejected an earlier draft of the statute that would have followed the Illinois Arbitration Act with regard to judicial review of questions of law. *See* 34 *Proceedings of the National Conference of Commissioners on Uniform State Laws* 97 (1924).

At the time Congress enacted the FAA, the New York courts, interpreting the 1920 New York Arbitration Act and its predecessors, had "uniformly held that any finding of fact or conclusion of law of an arbitrator will not be reviewed." *C. Itoh & Co. v. Boyer Oil Co.*, 191 N.Y.S. 290, 292 (N.Y. App. Div. 1921); *accord A.O. Andersen Trading Co. v. Brimberg*, 197 N.Y.S. 289, 290 (N.Y. Sup. Ct. 1922) (claims that arbitrator "misconstrued the agreement out of which the controversy arose, and applied the wrong measure of damages * * * are not open for consideration at this time, as the award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts"). This was because the New York Arbitration Act "state[s] the grounds on which an arbitration award may be vacated or modified," which did not include errors of law or fact, and "[a]wards should not be impeached, except

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[7] Section 8 of the New York Arbitration Act of 1920 provided that Sections 2365-2386 of the New York Code of Civil Procedure would apply to arbitration agreements. *See* N.Y. Act of Apr. 19, 1920, ch. 275. Sections 2374 and 2375 of the Code of Civil Procedure were the source for Sections 10 and 11 of the FAA; Sections 2366 and 2373, combined, were the source for Section 9 of the FAA. All those sections of state law were shortly thereafter recodified, without amendment, as Sections 1419, 1420, 1411, and 1418, respectively, of the New York Civil Practice Act of 1920, ch. 925. The next year, these state provisions were again renumbered as Section 1456, 1457, 1458, 1449 of the Civil Practice Act. *See* N.Y. Act of 1921, ch. 199, § 14.

upon substantial grounds and for the reasons specified in the law." *Itoh*, 191 N.Y.S. at 292, 293; *see also Everett v. Brown*, 198 N.Y.S. 462, 465 (N.Y. Sup. Ct. 1923) (discussing language later used by Congress in Section 9 of the FAA and holding that the New York Arbitration Act provided "that the court must grant such an order [confirming the award] unless the award is vacated, modified, or corrected, as prescribed in the next two sections. * * * [This provision] relating to the confirmation of an award [is] mandatory, and leave[s] no discretion to the court. It prescribes that the court must confirm the award, unless such award has been vacated, modified or corrected").[8]

The New York courts emphasized that if judicial review of an arbitrator's legal or factual determinations were available, "the award, instead of being the end of the litigation, would simply be a useless step in its progress." *Itoh*, 191 N.Y.S. at 292 (*quoting Sweet v. Morrison*, 22 N.E. 276, 280 (N.Y. 1889)); *see Everett*, 198 N.Y.S. at 465 (if the "proper court would still have to pass upon and decide the law and the facts as if no award had been made," then that

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[8] Earlier decisions in other States similarly held that statutory grounds for vacatur of an arbitration award were the exclusive grounds on which a court could rely to deny an application to confirm an award. *See, e.g, Phelps v. Donovan*, 75 N.W. 94, 94 (Mich. 1898) ("The award is conclusive, and the court can only refuse to enter judgment confirming it for one of the reasons specified in the statute."); *Carsley v. Lindsay*, 14 Cal. 390, 394 (Cal. 1859) ("An impeachment on this ground [that the award is contrary to law and evidence] was not admissible at common law, and, if it were, our statute (Practice Act, 385, et seq.), prescribes *other* grounds, as those upon which alone the award can be vacated by the District Court upon motion."); *Reeves v. McGlochlin*, 65 Mo. App. 537 (Mo. Ct. App. 1896) ("The award can only be vacated or modified for reasons set out in the statute (sections 405, 406) and the defendant's motion did not include any of these."); *Hackney v. Adam*, 127 N.W. 519, 521 (N.D. 1910) ("It was not error to deny such motion" to vacate an arbitration award because "appellant did not bring himself within any of the statutory grounds enumerated in section 7699, Rev. Codes 1905, for the vacation of an award.").

"would operate to defeat the object of the [arbitration] proceeding").

Congress drew the text of the FAA directly from the New York Arbitration Act. *See* S. Rep. No. 68-536, at 3 (1924); *1924 Hearing*, *supra*, at 10 (statement of W.H.H. Piatt, Chairman of the American Bar Association Comm. on Commerce, Trade and Commercial Law); *id.* at 16 (statement of Julius Cohen, member of the Comm. on Commerce, Trade and Commercial Law); *id.* at 19 (statement of Francis B. James); *id.* at 21 (statement of Herbert Hoover, Secretary of Commerce); *id.* at 25 (statement of Alexander Rose, representing Arbitration Society of America); *id.* at 34 (Julius Cohen). Congress was informed that the New York courts had "given the strongest support to the powers of the arbitrators thereunder and to the finality of their awards, and [had] refused to permit the invasion of technicalities in the application of the [Act] or the determination of rights under it." *1924 Hearing*, *supra*, 40 (Julius Cohen). In using the language of the New York Arbitration Act, Congress intended to adopt the settled meaning those terms had already acquired. *See Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 307 (1898); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (Congress is presumed to know law in an area in which it is legislating).

c. The differing approaches of the Illinois and New York statutes on this point were recognized by both sides of the debate that was brewing around the country about the substance of new arbitration laws being considered at both the State and federal level at the time of the enactment of the FAA. The National Conference of Commissioners on Uniform State Laws debated whether to adopt the New York approach or the Illinois approach for the Uniform Arbitration Act, and issued a report in 1924 that called attention to the fact that Illinois allowed court review of law whereas New York made "the arbitrator the final judge on matters of law and fact."

Report on the Uniform Arbitration Act, 34 *Proceedings of the National Conference of Commissioners on Uniform State Laws* 639 (1924). After the enactment of the FAA, the National Conference criticized the fact that the "new Federal Act * * * and the New York and New Jersey Acts, make the decision of the arbitrators final in law and fact" and it urged States to enact the Uniform Arbitration Act in order to permit judicial review of an arbitration award for legal error. *Report on the Uniform Arbitration Act*, 35 *Proceedings of the National Conference of Commissioners on Uniform State Laws* 758 (1925).

Indeed, the debate provoked comment by the then-Dean of Columbia Law School Harlan Stone, who noted in a major public address that, under the New York Arbitration Act, arbitrators "are not subject to any kind of judicial control or review" save "in extreme cases." Harlan F. Stone, *The Scope and Limitation of Commercial Arbitration*, 10 Acad. Pol. Sci. Proc. 501, 503, 506 (1923). This meant, he contended, that parties would be better off to avoid arbitration when "the law applicable to [the controversy] may be difficult to ascertain." *Id.* at 503, 502.

Supporters of the FAA did not argue, as petitioner contends (Pet. Br. 24), that the parties to an arbitration agreement under the FAA could agree to judicial review of any type they desired, so long as consistent with a "normal judicial function." To the contrary, they recognized that the New York Arbitration Act and the FAA did not authorize such judicial review and touted it as one of the virtues of those Acts. Julius Cohen, in his written testimony to Congress, explained that an application to confirm an arbitration award "must be granted as a matter of course, unless the award is vacated, modified, or corrected." He emphasized that "the grounds for vacating, modifying, or correcting an award are limited," and that if a ground identified in the statute were proven, "then and then only the award may be modified or corrected." *1924 Hearing*, *supra*, at 34; *see also id.* at 36 ("There is no authority and no opportunity [under the FAA] for the court, in

connection with the award, to inject its own ideas of what the award should have been.").

4. *Volt* and *First Options* do not support petitioner's contrary interpretation of the FAA

Because petitioner has neither text, structure, nor history on its side, it repeatedly attempts to find support in two decisions of this Court, *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), but neither provides the governing framework for this case.

Volt involved the relationship between the arbitration laws of two sovereigns, and thus relied on principles of federal preemption law to determine whether state law yielded to federal law. The Court held that the FAA did not preempt a California arbitration law that was similar, but not in all respects identical, to federal law because the state law did not frustrate the purposes of the FAA. But petitioner is not seeking to rely on a statutory scheme enacted by another sovereign. It seeks, in essence, this Court's sanction to be its own sovereign and establish a standard of review that is not the law of any State's current general arbitration act.[9]

The *Volt* Court's holding was also closely tied to the language of Section 4 of the FAA, which provides a right to seek a court order compelling arbitration. The Court held

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[9] After Congress's enactment of the FAA, the tide turned against state arbitration statutes modeled on the Illinois Arbitration Act, with its provision permitting judicial review for legal error. The National Conference adopted a new Uniform Arbitration Act in 1955 that, contrary to its earlier view, rejected judicial review for legal error and followed the FAA's grounds. *See* Macneil, *supra*, at 55-56. Eventually every State with a general arbitration statute (including Illinois) adopted a version that tracked the FAA's language regarding confirmation, vacatur, modification, and correction. *Id.* at 54-57.

that Section 4, consistent with its text, did "not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'" 489 U.S. at 474-475 (*quoting* Section 4). There is no similar language in Sections 9, 10 or 11 that ties the power of the court to confirm, vacate, modify, or correction an award to the "manner" of arbitration provided for in the parties' agreement.

Further, instead of governing whether or when an arbitration will proceed before an arbitrator, which was the issue in *Volt*, petitioner wishes to control through private agreement how a federal court must resolve an application to confirm or vacate an award. Whatever the scope of the parties' authority to dictate an arbitrator's tasks and methods, nothing in *Volt* allows the parties to dictate the grounds on which a court decides whether to confirm or to vacate an award.

First Options is also inapplicable. That case resolved the question whether a dispute about the arbitrability of an underlying controversy should be heard by the arbitrator or a court. The FAA did not directly address the question, and the Court held that the parties could agree to have an arbitrator decide whether the underlying dispute was arbitrable. That followed from the general rule that the parties can agree to have any controversy, including a controversy about the scope of arbitration, settled by an arbitrator. *See* 9 U.S.C. § 2.

Both *Volt* and *First Options* contain language that emphasizes that it is the parties' agreement, and not the efficiencies or inefficiencies of the parties' agreement, that justifies the courts abiding by the terms of the arbitration agreement. But neither case involved the judicial enforcement of an award. In neither case were the parties claiming that by agreement they could compel a court to do something not authorized by the statute. And in neither case was there clear evidence in the text, structure, and history of the FAA, as there is here, that Congress had

made a deliberate choice not to provide the particular authority that the parties sought.

B. Petitioner's Interpretation Of Section 9 To Allow Parties To Impose Conditions On Judicial Confirmation Of An Award Runs Contrary To Restrictions Against Private Party Control Over Judicial Authority, Has No Limit, And Raises Constitutional Doubt

Petitioner, to the extent it addresses the text of the FAA at all, focuses on the provision in Section 9 that makes judicial confirmation of an award available only where the parties agreed in their arbitration agreement to have a judgment of the court entered on the award. Petitioner argues that, because parties to an arbitration agreement can choose not to agree to have a court enter judgment on an award under the FAA at all, those parties are free (Pet. 23-24) to condition their agreement to have a court enter judgment on an award under the FAA on any grounds they desire (at least so long as it accords with what petitioner deems to be a "normal judicial function").

Section 9 cannot support that reading. Congress made Section 9 applicable only in instances where the arbitration agreement includes a provision for entry of a judgment on the award as a means to distinguish arbitration awards that can be enforced through the expedited judicial procedures of the FAA (because the parties agreed to it), from awards that are judicially enforceable only through a more laborious common law contract action (because they do not include such a provision). *See* 4 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 38.2.2, at 38:23-24 (1994). Congress did not intend to allow private parties to create their own grounds for vacatur.

1. Private parties cannot dictate the federal law that a court applies or control a court's exercise of equitable authority

It is well settled in this Court's cases, and petitioner and its *amici* concur, that the FAA's "purpose was to place an arbitration agreement 'upon the same footing as other contracts.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (*quoting* H.R. Rep. No. 68-96, at 1 (1924)); *see also Volt*, 489 U.S. at 474. But petitioner's contention regarding Section 9 would place parties to an arbitration agreement in a favored position and empower them to dictate the workings of a court in a manner that no party to any other type of contract is entitled.

Petitioner's view is that parties to an arbitration can redefine the federal cause of action under Section 9 for confirmation of an arbitration award to include whatever supplemental elements they like. That is contrary to well-established law that the courts will not be bound by stipulations by the parties as to what federal law is. On questions of law "the court cannot be controlled by agreement of counsel." *Swift & Co. v. Hocking Valley Ry. Co.* 243 U.S. 281, 289 (1917); *see also Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law.").

This case is very different than the cases cited by petitioner (Pet. Br. 37) in which a party waived a statute of limitations, which is an affirmative defense that a court need not address at all unless raised by one of the parties. *See* Fed. R. Civ. P. 8(c); *Kontrick v. Ryan*, 540 U.S. 443, 453, 458-460 (2004). Petitioner in this case seeks to add new affirmative defenses to confirmation under Section 9 that Congress never intended. There is nothing in the FAA that warrants such an astounding result.[10]

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[10] Some courts have framed their rejection of petitioner's expanded judicial review in terms of a rejection of the parties' alteration of the

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Furthermore, in a standard civil action, a federal court is not bound by the parties' agreements about how a court will exercise its equity power. For example, a court's equitable authority to vacate a judgment on mootness grounds is not controlled by the parties' settlement agreement. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994). Likewise, in determining whether to enter an order embodying a remedy agreed to by all parties—a consent decree—a court is not bound by the parties' agreement. "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961).

Instead, absent a clear statement from Congress (such as that in Section 9 that a court "must" confirm an award unless certain grounds are present), a federal court holds broad discretion to vacate, correct, or modify a judgment. *See TVA v. Hill*, 437 U.S. 153, 193-194 (1978). Yet under petitioner's view, a court would be bound to vacate, modify, or correct an award based on grounds agreed to by private parties, rather than the grounds established by Congress.

"jurisdiction" of the federal courts, and petitioner acts as if those courts are concerned solely with subject-matter jurisdiction. Pet. Br. 30-31 n.6, 35-36; *see also* Pacific Legal Foundation Br. as *Amicus Curiae* 17-18. But the term "jurisdiction," used in a non-technical sense, *see Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1405 (2007), encompasses a whole host of interrelated doctrines about the role of an independent judiciary and the ability of litigants (or even Congress) to dictate the methods or results in a particular case. It is in this sense that petitioner's argument raises significant jurisdictional concerns.

2. Petitioner's "normal judicial function" suggestion only highlights that there is no meaningful stopping point to petitioner's argument

Petitioner's central argument would permit parties to an arbitration agreement to agree to require that a court rely on methods of dispute resolution that are foreign to American judicial proceedings (such as the inquisitorial as opposed to adversarial method of factfinding) or that are premised on decisionmaking standards not accepted by the judiciary (such as a coin toss or reference to astrological signs).

Aware of this enormous flaw in its theory, petitioner attempts to cabin its position by asserting that the grounds for confirmation or vacatur chosen by parties must be consistent with a "normal judicial function." Pet. Br. 24, 35. This purported limitation is, of course, created out of whole cloth and does not establish any true limit.

District courts regularly apply a wide range of review standards under a variety of federal statutory schemes. Thus, there are multiple grounds for review that parties could choose, each of which may be consistent with a "normal judicial function." For example, a district court could be required to review an arbitration award for "substantial evidence" or "arbitrary, capricious * * * abuse of discretion." 5 U.S.C. § 706 (standards of review applicable under the Administrative Procedures Act). Or a district court could be required to determine whether an award complies with "a reasonable interpretation of clearly established law." 28 U.S.C. § 2254(d)(1) (standard for district court assessment of certain legal questions in habeas corpus proceeding). Another agreement might call for a court to review an arbitrator's findings for clear error, *see* Fed. R. Bank. P. 8013 (standard for district court review of bankruptcy judge findings of fact), while another might require an assessment of whether an arbitrator has made an "unreasonable determination" of the facts,

28 U.S.C. § 2254(d)(2) (standard for district court assessment of facts found by a state court in the context of a habeas proceeding). The law on judicial confirmation and vacatur of arbitration awards would develop with little consistency, much less certainty, in light of the myriad standards that parties could require courts to apply.

Under petitioner's theory (Pet. Br. 35), parties to an arbitration agreement could even require a court to review factual findings in an arbitration award *de novo*. *See United States v. Raddatz*, 447 U.S. 667, 676 (1980) (*de novo* review by district court in case involving recommendations by magistrate judge). *De novo* review would certainly render arbitration nothing more than a dress rehearsal for full-scale court litigation which is directly contrary to the purpose of the statute.

Nothing in petitioner's theory is limited to trial courts. Its theory means that parties to an arbitration agreement could choose their own standards for the *appellate* court review that is authorized under Section 16, as a condition for court entry of judgment. Parties presumably could set whatever standard they chose for review of a confirmation, vacatur, modification, or correction of an award, to be applied by even this Court. Indeed, because appellate courts sometimes engage in *de novo* review of facts, *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984), petitioner would apparently permit parties to foist *de novo* review on appellate courts.

The logic of the proposal would allow parties to agree to *override* the statutory vacatur grounds and agree to require confirmation of an award by a court notwithstanding the existence of grounds for vacatur or modification under Section 10 or 11. *Cf. Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64-65 (2d Cir. 2003) (court refused to follow parties' agreement to have award confirmed even if grounds for vacatur of award under Section 10 exist). This would mean that, if the parties

so agreed, a court would be compelled to confirm an award and enter judgment on it even if, for example, an arbitrator was obviously biased or refused to hear material evidence—an untenable situation for the court engaging in the judicial review.

3. Petitioner's interpretation of the FAA raises serious constitutional doubt under Article III

Petitioner contends (Pet. Br. 35-36) that what it seeks to impose on the judiciary is the equivalent of a court relying on a magistrate judge, special master, or bankruptcy court. In fact, those analogies reveal constitutional doubts about petitioner's argument.

This Court has consistently held that Article III imposes some limits on the ability of Congress or parties to require Article III judges to give their imprimatur to the conduct of non-Article III decisionmakers. *See Crowell v. Benson,* 285 U.S. 22, 51-65 (1932). Critical to this Court's holding that Congress can, consistent with Article III, delegate certain functions to magistrate judges was the fact that "[m]agistrates are appointed and subject to removal by Article III judges" and "the entire process takes place under the district court's total control and jurisdiction." *Peretz v. United States*, 501 U.S. 923, 937 (1991) (*quoting Raddatz*, 447 U.S. at 683). The same is true of special masters, *see* Fed. R. Civ. P. 53, and bankruptcy judges, *see Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 132 n.2 (1995) (Ginsburg, J., concurring). It is not true for arbitrators.

When parties agree to be bound by arbitration, they agree, in essence, to have the arbitrator speak for both parties in the arbitration award with regard to the meaning of the agreement. *Cf. Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) (arbitrator's interpretation and application of contract is treated by courts as if parties agreed to it). And

when a court engages in the statutorily prescribed review of such an award under Sections 10 and 11, the court reviews the process by which the award was made, not the correctness of the law or factfinding. In those circumstances, no Article III concerns arise because the arbitrator is acting as the representative of the parties and the court is not reviewing the substance of the award. The court is merely ensuring that the arbitrator was authorized to speak for the parties on the issue and that the process used by the arbitrator met the minimal requirements of the FAA so as to ensure an unbiased answer.

But if a court reviews the legal and factual correctness of an arbitration award at the directive of private parties, then it is hearing an appeal from a private decisionmaker without any control over that decisionmaker and, thus, without the Article III check on the process. To the extent that the arbitrator is serving in an advisory capacity, collecting a record, and making recommendations on the facts and law that the district court must review, the same Article III concerns raised by reliance on magistrate judges to render decisions may be implicated. This constitutional doubt must be considered in interpretation of the FAA, which one of petitioner's own *amici* characterizes as a close question of statutory interpretation. *See* Br. of CTIA as *Amicus Curiae* 2.

4. Petitioner's novel legal theory under Section 9 does not entitle it to reversal of the court of appeals' judgment, much less the relief it obtained in the district court

a. Petitioner's novel theory that the parties agreed to have an award judicially confirmed under Section 9 of the FAA only if subject to certain conditions founders on the text of the arbitration agreement in this case. Looking at the text of the arbitration agreement, the parties, in a single sentence, unconditionally agreed that they would submit the award to the court "for the confirmation of the

decision as a judgment of such court." Pet. App. 15a (¶ 24). That sentence thus made applicable a court's duty under Section 9 to confirm the award unless grounds under Section 10 or 11 existed. The language that sought to enhance the power of the court to vacate, modify, or correct the award on nonstatutory grounds was included in other sentences that did not contain any express language conditioning the entry of judgment on such power. *Id.* at 15a-16a (¶¶ 24, 27). And the court of appeals ruled that the sentences were severable. *Id.* at 115a (parties did not intend "that the entire arbitration agreement should fail in the event that the expanded standard of review provision failed"); *see supra*, note 2. Petitioner offers no ground, and there is none, for not also recognizing that the one provision was not conditioned on the other. (The court of appeals did not directly address the question in terms of whether the agreement was conditional because petitioner did not press its novel reading of Section 9 below, but its state law holding is equally applicable.).[11]

b. Petitioner acknowledges that there is nothing in Section 10 or 11 of the FAA that permits vacatur, modification, or correction based on errors of law or fact.[12]

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[11] Whether the arbitration agreement conditioned the enforcement of an arbitration award on another provision is a question, like the question of severability, that is governed by state law because "state-law principles of contract interpretation" govern "an arbitration agreement within the scope of the Act." *Volt*, 489 U.S. at 475-476. To the extent federal law plays a role, it requires that any ambiguities in the arbitration agreement be "resolved in favor of arbitration" based on "the federal policy favoring arbitration." *Id.* at 476. Petitioner argued below that the severability question was a question governed by Oregon state contract law. *See* Pet. C.A. (No. 03-35525) Br. 33 n.7; Pet. C.A. (No. 03-35525) Pet. for Reh'g 10-11.

[12] Indeed, petitioner's Question Presented asks whether parties can agree to "more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA." Pet. i; *see also* Pet. Br. 13 (standard of review in parties' arbitration agreement is "different than the statutory grounds for vacatur or modification under sections 10 or 11"). That the grounds for review in

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It rests its legal arguments before this Court on its contention that the agreement cannot support confirmation of the original award because, under petitioner's theory, the confirmation was conditioned on the nonstatutory grounds of vacatur.

But that theory cannot support the relief that petitioner sought and initially received from the district court, which was vacatur under Section 10 of the arbitrator's original award and entry of a modified award under Section 11 in its favor. Vacatur and modification of an award are not available in the cause of action under Section 9 to confirm an award, which is where petitioner now rests its case. It is only in the separate causes of action to vacate or modify under Sections 10 and 11 that such remedies are available. Thus, even if petitioner could prevail on its argument regarding conditions placed on the agreement to judicial confirmation under Section 9 (Pet. Br. 24-25), that legal theory would entitle petitioner only to a denial of the application to confirm the award (if it could show an error in law or fact), but not to a vacatur of the award itself, and not to a judicial modification of the award and entry on such award. If petitioner prevails, the parties would be left to a state law contract action to determine the enforceability of the award. *See* 4 Macneil, Speidel & Stipanowich, *supra*, § 38.2.2, at 38:23-24.

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the arbitration agreement "differ from those of the FAA respecting action by a court" was also petitioner's view in the court of appeals, including when it was seeking rehearing *en banc* and not bound by any Ninth Circuit precedent. *See* Pet. C.A. (No. 03-35525) Pet. for Reh'g 13. Further, by framing the question in terms of the district court's authority under the FAA and claiming that there was a split in the circuits on this question, petitioner abandoned the argument, which it made in the court of appeals, that the expanded review provision of this agreement to arbitrate was not governed by the FAA. *See* Pet. 8-9 (summarizing arguments made but rejected in court of appeals); Pet. C.A. (No. 03-35525) Br. 27, 31, 33; Pet. C.A. (No. 03-35525) Pet. for Reh'g 2, 9-10.

C. Petitioner's Position Is Contrary To The Core Purposes Of The FAA, Would Lead To Havoc For Arbitrators And Courts Alike Rather Than Lessen Burdens On Courts, And Fails To Account For Appellate Arbitration

Petitioner's policy arguments and its broad declaration that its interpretation does not undermine the goals and policies of the FAA (Pet. Br. 31-40), ignore the fact that these very arguments were widely known and debated in the legal community at the time of the FAA's enactment. To the extent parties to an arbitration agreement want further review of a decision by an arbitrator that differs from that permitted by the FAA, appellate arbitration has been and continues to be an available option.

1. Judicial review for legal and factual error is contrary to the public purposes of the FAA and would create burdensome confusion in arbitration and the courts

Petitioner ignores the central public purposes of the FAA to foster finality in arbitration awards and to promote arbitration as an alternative to, not a prelude to, costly and time-consuming litigation. Selection by parties of nonstatutory grounds for judicial vacatur, modification, and correction of arbitration awards based on error of law or fact is contrary to those core purposes.

a. Petitioner's argument must be rejected because it would lead to havoc for arbitrators and courts alike. For example, judicial review of arbitration awards for errors of law or fact would almost certainly mean that arbitrations would become like court proceedings, with adoption of explicit limits on the scope of the record, rulings on evidentiary objections, and formal findings. That would burden the arbitration process and seriously undermine the time and cost savings that arbitration is supposed to yield.

Or, if arbitration proceedings remained informal and less structured, courts would be thrown into the disconcerting role of reviewing for factual error where rules of evidence do not govern, for legal error where legal rulings are based on such records, and reviewing awards with no requirement for a detailed written rationale. Such a system would almost certainly lead to wasteful remands to arbitrators to require them to amend their decisions to "show their work," even where the arbitrator then reaches the same decision (as happened in the instant case on the question of the interpretation of the lease term "predecessor-in-interest," where the district court remanded for a fuller factual explication in the decision and the arbitrator reached the same conclusion after adding a few evidentiary references and discussion to its decision).

Imposition of additional work on arbitrators for failure to provide court-like legal rulings contravenes the purpose of the FAA. *See Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 184 (7th Cir. 1985) (Posner, J.). One of the benefits of arbitration is supposed to be that "[t]he usual court atmosphere does not get into the arbitration hearings." *1924 Hearing*, *supra*, at 7 (Charles L. Bernheinmer); *cf. A.O. Andersen Trading Co. v. Brimberg*, 197 N.Y.S. 289, 290 (N.Y. Sup. Ct. 1922) (rejecting party's claim that the arbitrator erred in refusing to "have the testimony taken down by a stenographer and transcribed" because "defendant's insistence for a stenographic record was based upon his desire to review rulings upon testimony and points of law. But such a review, as already stated, is something he would not be entitled to.").

In either event, a number of inevitable questions will then arise for the reviewing court including, for example, what to do about harmless error analysis in party-created grounds for vacatur, modification, or correction.

And permitting the parties to define the terms of judicial review of questions of law will lead to collateral disputes regarding difficult questions of what the parties intended to constitute a question of law. *See Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion."). In cases such as this, where the meaning of the parties' underlying lease agreement may be viewed as a question of law, fact, or a mixed question of fact and law in different States and under different circumstances, there are no easy lines to draw.[13] Indeed, a leading arbitration scholar explained 80 years ago, in criticizing a state statute based on the Illinois Arbitration Act, that if such judicial review were permitted, a court would need to resolve whether the following are questions of law subject to judicial review: "the construction or interpretation of a written document;" "what is the law of a certain state or country;" "competency and credibility of witnesses and the admissibility and materiality of testimony." Wesley A. Sturges, *Arbitration Under the New North Carolina Arbitration Statute—The Uniform Arbitration Act*, 6 N.C. L. Rev. 363, 407 (1927).

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[13] Even if a district court reviews a question of "law," the court may well have to review factual evidence presented to the arbitrator. For example, Oregon contract law, which governs the interpretation of the underlying lease in this case, provides that whether "the terms of an agreement are ambiguous is in the first instance a question of law for the trial court," but that the court "may consider parol and other extrinsic evidence to determine whether the terms of an agreement are ambiguous." *Abercrombie v. Hayden Corp.*, 883 P.2d 845, 853 (Or. 1994). If the trial court concludes that the terms are ambiguous (and the relevant lease terms here are, at a minimum, ambiguous) it is for the factfinder to resolve the ambiguity. *See ibid.*

Under petitioner's view, parties may mix and match grounds for vacatur of an award and standards of review. That will not lessen the burden on the district court; it will increase it. And the uncertainty about harmless error, about whether an issue is one of law or fact, etc., will create more, not less, work for district courts because they will be required to treat each case under the FAA *sui generis*.

b. Judicial review of the substance of an arbitration award would transform arbitration into a mere prelude to litigation and thus burden the parties with an exhaustion requirement without benefiting the courts. Instead of the arbitration being the "main event," it becomes a " 'tryout on the road' for what will later be the determinative" judicial proceeding. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). During the national debate on the issue in the 1920s, Julius Cohen explained that the New York Arbitration Act had not included a provision permitting judicial review of errors of law, as was permitted in Illinois and previously in England, precisely because "the introduction of legal questions for disposition by the courts destroyed the very effect of arbitration and really made for litigation." 34 *Proceedings of the National Conference of Commissioners on Uniform State Laws* 98 (1924) (statement of Julius Cohen); *see also Burchell v. Marsh*, 58 U.S. 344, 349 (1854) (holding that "a court of equity will not set [an arbitration award] aside for error, either in law or fact" because a "contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.").

Petitioner's *amici* suggest that parties to an arbitration agreement will include a provision for review of law and fact in an agreement only if there is a substantial interest at stake for one of the parties. *See* Br. of CTIA as *Amicus Curiae* 8; New England Legal Foundation, *et al.* Br. as *Amici Curiae* 14-15. But that is

no limit because, of course, parties to an arbitration agreement likely view what is at stake to be substantial even if not so viewed by others. And, if this type of review is generally available under the FAA, employees or homeowners may be able to argue that the absence of such review provisions in their arbitration agreements reflects a level of unfairness rising to the level of contractual unconscionability. Thus, extensive judicial review provisions could become part of a significant portion of the arbitration docket.

2. Appellate arbitration protects against any risk of an anomalous decision by an arbitrator

The fact that the FAA does not permit judicial review of arbitration awards for errors of law or fact does not mean that parties cannot protect themselves from the risk of an anomalous decision by an individual arbitrator.

First, the FAA authorizes the parties to select a particular arbitrator or to determine the qualifications of the arbitrator (or arbitrators) who will settle their controversy. *See* 9 U.S.C. § 5. Thus, parties can agree to have the controversy resolved by an arbitrator who is a retired judge or other legal expert in the relevant area of law. *See* 3 Macneil, Speidel & Stipanowich, *supra*, § 27.2.3, at 27:4-7. Indeed, a representative of what is now the American Arbitration Association told Congress in 1924 that if questions of law are at issue, it was not uncommon for the parties to agree to have "some retired jurist, or a lawyer * * * sit and pass on them." *1924 Hearing*, *supra*, at 27 (statement of Alexander Rose, representing the Arbitration Society of America).

Further, appellate arbitration services are available through all the leading arbitration associations. Appellate arbitration services allow parties to agree to a full review by another arbitrator or arbitrators of an award under

whatever standards the parties choose.[14] As one scholar noted the year after the FAA was enacted, in such "comparatively rare cases" where "large sums are at stake and it is felt that there should be an opportunity to review the arbitrators' decision to correct any mistakes, inadvertent or otherwise," the "arbitration agreement could well be drawn to provide for a review by a board of appeal." Wharton Poor, *Arbitration under the Federal Statute*, 36 Yale L.J. 667, 676 (1926). Appellate arbitration is preferable, he opined, to the method then existing in England for judicial review because "a right to review by the courts adds considerably to the potential expense of the proceedings and is, in substance, adding a fifth wheel to the wagon." *Ibid.*

Thus, judicial review is not necessary to preserve the integrity of arbitration awards. The parties can contract for such review within the arbitration system. What they cannot do is impose responsibilities on the federal courts that Congress, in the FAA, did not authorize.

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[14] *See* American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* 37 (2007), *available at* http://www.adr.org/si.asp?id=4125; American Arbitration Association, *The AAA Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts* 18-19 (2007), *available at* http://www.adr.org/si.asp?id=4366; CPR, The International Institute for Conflict Prevention & Resolution, *Arbitration Appeal Procedure* (2005), http://www.cpradr.org/arb_appeal_intro.asp?M=9.2.3; JAMS, *Optional Arbitration Appeal Procedure* (2003), *available at* http://www.jamsadr.com/images/PDF/optional_arbitration_appeal-2003.PDF.

Indeed, one of petitioner's own *amici*, the CTIA, sponsored arbitration rules that are administered by the American Arbitration Association that expressly allow parties to agree to appellate arbitration. *See Wireless Industry Arbitration Rules* § L-6 (2003) ("The parties may provide by prior agreement for the review of any award. * * * The review will be conducted by a new arbitrator selected in the same manner as the initial arbitrator, subject to any conditions to which the parties have agreed. The review arbitrator * * * may review the original award to the same extent as the original arbitrator."), *available at* http://www.adr.org/sp.asp?id=22010.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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